



**FILED**

Apr 24 2008, 10:25 am

*Kevin L. Smith*

**CLERK**

of the supreme court,  
court of appeals and  
tax court

ATTORNEYS FOR APPELLEE:

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**IN THE  
COURT OF APPEALS OF INDIANA**

[illegible]

No. 20A05-0711-CR-640

APPEAL FROM THE ELKHART CIRCUIT COURT  
The Honorable Terry Shewmaker, Judge  
Cause No. 20C01-0605-FA-46

**April 24, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Jon J. Reid appeals his convictions for Possession of Cocaine with Intent to Deliver,<sup>1</sup> a class A felony, and Possession of a Schedule I Controlled Substance,<sup>2</sup> a class D felony. Specifically, Reid argues that the trial court abused its discretion in denying his request for a continuance of the jury trial and that the evidence was insufficient to support the convictions. Finding no error, we affirm the judgment of the trial court.

### FACTS

On May 25, 2006, at approximately 10:00 p.m., several members of the Elkhart County Interdiction and Covert Enforcement (ICE) Unit executed a search warrant at 317 Concord Avenue in Elkhart. The search warrant was based upon two controlled drug buys that occurred at that residence on May 22 and May 24. The Elkhart Special Response Team first employed a distraction device in the backyard, which was a “really loud” bang. Tr. p. 59, 76, 146-47. The officers entered the house and took the homeowners, Martin and Shellise Jiminez, into custody. Officers then tried to enter the detached garage, which was locked. However, after obtaining a key and unlocking the garage door, Lieutenant Edward Windbigler entered and found Reid—Shellise Jiminez’s son—sleeping on a couch.

The cluttered garage contained the couch, a television, a Playstation video game system, a small refrigerator, clothing, and shoes, which were all located in a contained

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<sup>1</sup> Ind. Code § 35-48-4-1(b).

<sup>2</sup> I.C. § 35-48-4-7(a).

area. A search of the garage revealed a plate and a razor blade with .309 grams of cocaine sitting in plain view on a shelf, a baggie containing .024 grams of cocaine, a digital scale containing white residue, over twelve grams of cocaine in a Reebok tennis shoe that was sitting at the top of a plastic container near the television, .943 grams of powder cocaine and one Ecstasy pill in plastic baggies in the container. One of Reid's pay stubs was also found in the garage, and the officers recovered nearly 200 grams of marijuana in an upstairs bedroom of the house.

On May 31, 2006, the State charged Reid with possession of cocaine with intent to deliver, a class A felony, possession of marijuana, a class D felony, and possession of Ecstasy, a class D felony. Reid requested a speedy trial, which the trial court set for September 25, 2006. However, on September 15, 2006, Reid filed a motion to withdraw his speedy trial request and a motion to continue the trial. Reid based his motion for continuance on the unavailability of his mother to testify because she was ill and had recently been admitted to the hospital. Reid alleged that she would still be hospitalized on the day of trial. Following a hearing, the trial court denied Reid's request to continue the trial.

Four days later, Reid proceeded to trial. His mother did testify, albeit with a surgical mask to prevent exposure to germs. Following the presentation of evidence, the jury found Reid guilty of possession of cocaine with intent to deliver, a class A felony, and possession of a controlled substance, a class D felony. The trial court sentenced Reid to an aggregate thirty-five year sentence on both counts, with two years suspended to probation. Reid now appeals.

## DISCUSSION AND DECISION

### I. Motion for Continuance

Reid first contends that his convictions must be reversed because the trial court abused its discretion in denying his request to continue the trial. Specifically, Reid argues that although his mother actually testified at the trial, she did not do so “under the best conditions” because she had been recently diagnosed with leukemia. Appellant’s Br. p. 11. Therefore, Reid argues that he is entitled to a new trial.

In resolving this issue, we note that at the heart of a motion for a continuance based upon the unavailability of a witness is the fact that the witness is unavailable. Ind. Code § 35-36-7-1. Although Reid claimed that it initially appeared as though his mother would be hospitalized and unavailable, she was discharged from the hospital at some point, and she did, in fact, testify on Reid’s behalf. Tr. p. 303-24. Reid makes no claim that his mother was unable to provide any vital testimony because of her illness. Therefore, he has not demonstrated any prejudice as a result of the denial of his motion to continue the trial and we conclude that the trial court did not abuse its discretion in denying the motion.<sup>3</sup>

### II. Sufficiency of the Evidence

Reid next claims that the evidence was insufficient to support his convictions. Specifically, Reid argues that his convictions must be reversed because the evidence only

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<sup>3</sup> As an aside, we note that Reid failed to establish “good cause” for a continuance “by affidavit or other evidence” in accordance with Indiana Trial Rule 53.5. Therefore, the trial court properly exercised its discretion in denying the motion.

established his mere presence at the house and the State failed to prove that Reid “possessed any controlled substances at the time he was apprehended by the officers.” Appellant’s Br. p. 17.

In reviewing Reid’s challenge to the sufficiency of the evidence, we do not reweigh the evidence or assess the credibility of witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the evidence favorable to the verdict and all reasonable inferences therefrom. Id. Inconsistencies in testimony are factual issues for the jury to resolve, and we will affirm the conviction unless “no rational fact-finder” could have found the defendant guilty beyond a reasonable doubt. Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000). Moreover, a verdict may be sustained on circumstantial evidence alone if that circumstantial evidence supports a reasonable inference of guilt. Allen v. State, 798 N.E.2d 490, 500 (Ind. Ct. App. 2003).

In order to convict Reid of cocaine possession with intent to deliver as a class A felony, the State had to establish beyond a reasonable doubt that: (1) he possessed cocaine; (2) in an amount over three grams; and (3) with the intent to deliver cocaine. I.C. §35-48-4-1. To convict Reid of possession of a schedule I controlled substance, the State was required to prove beyond a reasonable doubt that Reid knowingly or intentionally possessed Ecstasy, a schedule I controlled substance, without a valid prescription. I.C. §35-48-4-7.

In this case, the State prosecuted Reid upon the theory of constructive possession. Evidence of constructive possession is sufficient if the State establishes that the defendant had both the capability and the intent to maintain dominion and control over the

contraband. Hardister v. State, 849 N.E.2d 563, 573 (Ind. 2006). Where a person's control over the premises where contraband is found is non-exclusive, intent to maintain dominion and control may be inferred from additional circumstances indicating that the person knew of the contraband's presence. Id. at 574. Such additional circumstances may include: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the drugs or weapons; (5) drugs or weapons in plain view; and (6) location of the drugs or weapons in close proximity to items owned by the defendant. Id. Proof of a possessory interest in the premises in which contraband is found is adequate to show the capability to maintain control and dominion over the items in question. Massey v. State, 816 N.E.2d 979, 989 (Ind. Ct. App. 2004). To prove the element of intent, the State must demonstrate the defendant's knowledge of the presence of the contraband, which may be inferred from additional circumstances pointing to the defendant's knowledge of the presence of the contraband if the control is non-exclusive. Id.

As discussed above, the evidence at trial revealed that Reid was in the garage surrounded by a plethora of drugs, a digital scale, a razor blade, and baggies. Moreover, several of the items that were seized were in plain view. Tr. p. 89, 93, 164, 182. Although Reid denied living at the house, his stepfather, Martin Jiminez, testified that Reid resided there at the time of the raid. Id. at 200, 203. Reid, his mother, and Terrence Taylor—who also lived at the residence—testified that Reid was frequently at the house, spent the night there on many occasions, and received his mail at the residence. Id. at 239-40, 311-13, 317-18, 340-41, 347, 351. Moreover, Reid had reported on a bond

reduction report that he had lived at that address for two years with his mother and step-father. Id. at 372.

The evidence further revealed that over twelve grams of cocaine was found in a Reebok tennis shoe that sat atop a rubber container. Id. at 91-92. The shoe was next to the television, which Reid admitted watching the night of the raid. Id. at 329. Also found in the rubber container were the Ecstasy pill, more cocaine, and marijuana. Id. at 92, 166-67, 187-88. Both Reid and Taylor testified that they had cleaned the garage a few days before the search warrant was executed and that they spent time in the garage watching television and playing videogames. Reid testified at trial that he did not know of anyone else who had been in the garage prior to the search. Id. at 361.

When examining the totality of the circumstances, it was reasonable for the jury to conclude that Reid was aware of the presence of the cocaine and the Ecstasy. Moreover, the evidence established that Reid had the intent and capability to maintain control over those drugs. See Jones v. State, 807 N.E.2d 58, 65 (Ind. Ct. App. 2004) (finding evidence of drug manufacturing and close proximity to items owned by the defendant to be sufficient to show his intent to maintain dominion and control over the crack cocaine and other contraband). As a result, we conclude that the evidence was sufficient to support Reid's convictions.

The judgment of the trial court is affirmed.

RILEY, J., and ROBB, J., concur.